IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

REALTIME DATA LLC d/b/a IXO,	§	
Plaintiff,	§	**Civil Action No. 6:15-cv-468**
v.	§	**JURY TRIAL DEMANDED**
RIVERBED TECHNOLOGY, INC. and DELL INC.,	§	**LEAD CONSOLIDATED CASE**
Defendants.	§	

THIRD AMENDED PROPOSED JURY INSTRUCTIONS

Plaintiff Realtime Data LLC d/b/a IXO (Realtime) and Defendant Riverbed Technology, Inc. (Riverbed) submit these Third Amended Proposed Jury Instructions to reflect the Court's rulings and to narrow the disputes for charge conference. Agreed portions of the proposed instructions are provided in black. Where the parties disagree on a proposed instruction, Realtime's requested submissions and objections to Riverbed's requests are in green. Riverbed's requested submissions and objections to Realtime's requests are in blue.

By joining in this joint submission, the parties do not concede that the other side has the right to submit any claim to the jury and the parties expressly reserve the right to supplement, amend, or withdraw any submission based on the evidence presented at trial and to object to a submission by the other side. Further, by submitting claim interpretations consistent with this Court's prior rulings in this case, Riverbed does not concede that such interpretations are correct and expressly reserves the right to challenge the Court's interpretations of the claims of the patents asserted in this case on appeal.

Dated: May 24, 2017

Respectfully submitted,

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JURY INSTRUCTIONS

1. Introduction

MEMBERS OF THE JURY:

You have heard the evidence in this case. I will now instruct you on the law that you must apply. It is your duty to follow the law as I give it to you. On the other hand, you the jury are the judge of the facts. Do not consider any statement that I have made during the trial or make in these instructions as an indication that I have any opinion about the facts of this case.

After I instruct you on the law, the attorneys will have an opportunity to make their closing arguments. Statements and argument of the attorneys are not evidence and are not instructions on the law. They are intended only to assist you in understanding the evidence and the parties' contentions.[1]

1.1 General Instruction

A verdict form has been prepared for you. You will take this form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date, and sign the form.

Answer each question on the verdict form from the facts as you find them. Do not decide who you think should win and then answer the questions accordingly. With respect to each question asked, your answers and your verdict must be unanimous.

In determining whether any fact has been proven in this case, you may,

[1] Taken verbatim from this Court's Final Instructions [Doc. 594] in *Adaptix, Inc. v. Alcatel-Lucent USA, Inc.*, Civ. Action No. 6:12-cv-022, in the United States District Court for the Eastern District of Texas (Tyler Division) (hereinafter *Adaptix*) at 1.

unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.[2]

At times during the trial it was necessary for the Court to talk with the lawyers here at the bench out of your hearing, or by calling a recess. We met because often during a trial something comes up that does not involve the jury. You should not speculate on what was discussed during such times.[3]

1.2 Considering Witness Testimony

You the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence. By the Court allowing testimony or other evidence to be introduced over the objection of an attorney, the Court did not indicate any opinion as to the weight or effect of such evidence.

In determining the weight to give to the testimony of a witness, you should ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact, or whether there was evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people may forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider

[2] *Adaptix* at 2.
[3] *Adaptix* at 3.

whether that misstatement was an intentional falsehood or simply an innocent lapse of memory; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

In deciding whether to accept or rely upon the testimony of any witness, you may also consider any bias of the witness.[4]

1.3 How to Examine the Evidence

Certain testimony in this case has been presented to you through a deposition. A deposition is the sworn, recorded answers to questions asked to a witness in advance of the trial. Under some circumstances, if a witness cannot be present to testify from the witness stand, the witness testimony may be presented, under oath, in the form of a deposition. Sometime before this trial, attorneys representing the parties in this case questioned this witness under oath. A court reporter was present and recorded the testimony. This deposition testimony is entitled to the same consideration and is to be judged by you as to credibility and weight and otherwise considered by you insofar as possible the same as if the witness had been present and had testified from the witness stand in court.[5]

While you should consider only the evidence in this case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case.

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[4] *Adaptix* at 3.
[5] *Adaptix* at 3; *see* Fifth Circuit Pattern Jury Instructions (Civil Cases), Instruction 2.13 at 20.

The testimony of a single witness may be sufficient to prove any fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the other evidence you believe that single witness.

There are two types of evidence that you may consider in properly finding the truth as to the facts in the case. One is direct evidence such as testimony of an eyewitness. The other is indirect or circumstantial evidence—the proof of a chain of circumstances that indicates the existence or nonexistence of certain other facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from all the evidence, both direct and circumstantial.[6]

1.4 Objections to Evidence

Attorneys representing clients in courts such as this one have an obligation in the course of trial to assert objections when they believe testimony or evidence is being offered that is contrary to the rules of evidence. The essence of a fair trial is that it be conducted pursuant to the rules of evidence and that your verdict be based only on legally admissible evidence.

So, you should not be influenced by the objection or by the Court's ruling on it. If the objection is sustained, then ignore the question. If the objection is overruled, then you may treat the answer to that question just as you would treat the answer to any other question.[7]

[6] *Adaptix* at 4.
[7] *Adaptix* at 5.

1.5 Expert Witnesses

When knowledge of a technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field (he or she is called an expert witness) is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether the witness's testimony is believable or not, whether it is supported by the evidence and whether to rely upon it. In deciding whether to accept or rely upon the opinion of an expert witness, you may consider any bias of the witness.[8]

2. Contentions of the Parties

I will first give you a summary of each side's contentions in this case. I will then tell you what each side must prove to win on these issues.[9]

This is a patent infringement case. Realtime is the owner of the Patents-in-Suit. As the owner, Realtime has the right to exclude others from using the inventions, and to enforce, sue, and recover damages for past and future infringement of the patents.

The inventions at issue in the Patents-in-Suit relate to improved, particularized systems of digital-data compression to address problems specific to the compression of "digital data".

In this patent-infringement action, Realtime alleges that Riverbed has infringed and continues to infringe certain claims of U.S. Patent Nos. 8,643,513

[8] *Adaptix* at 6; *see also* Fifth Circuit Pattern Jury Instructions, 3.5.
[9] *Adaptix* at 8.

("'513 Patent") and 7,415,530 ("'530 Patent") (collectively, the "Patents-in-Suit"). Realtime has asserted the following claims of the Patents-in-Suit (collectively, the "Asserted Claims"):

- ’513 Patent: claim 1; and
- ’530 Patent: claims 1, 14.

The accused products in this case are SteelHead models 520, 1020, 2020, 1520, 3020, 3520, 5520, 6020, 1050, 2050, 250, 550, 5050, 6050, 7050, CX555, 755, 1555, EX560, 760, 1160, 1260, CX5055, 7055, C255, EX1360, VCX255, VCX555, CX555, CX570, CX770, EX1360, CX3070, 5070, 7070, Steelhead Mobile, and Steelhead Software as a Service (collectively, "Accused Products"). Realtime seeks a reasonable royalty for Riverbed's alleged infringement.

Riverbed denies Realtime's contentions and contends that it does not and has not infringed the Asserted Claims of the ’513 or ’530 Patents; it does not and has not induced third parties to infringe the Asserted Claims of the ’513 or ’530 Patents; and that Realtime is not entitled to damages. Riverbed further contends that the following claims are invalid as anticipated and/or obvious: claims 1 and 14 of the ’530 Patent and claim 1 of the ’513 Patent.

3. Burdens of Proof

In any legal action, facts must be proved by a required amount of evidence, known as the "burden of proof." Realtime has the burden of proving infringement and damages by a preponderance of the evidence. Preponderance of the evidence means the evidence that persuades you that a claim is more likely true than not true. If the proof establishes that all parts of one of Realtime's infringement claims are more likely true than not true, then you should find for Realtime as to that claim.

Riverbed has the burden of proving invalidity by clear and convincing evidence. Clear and convincing evidence means evidence that produces in your mind a firm belief or conviction as to the matter at issue. Although proof to an absolute certainty is not required, the clear and convincing evidence standard requires a greater degree of persuasion than is necessary for the preponderance of the evidence standard. If the proof establishes in your mind a firm belief or conviction, then the standard has been met. Those of you who are familiar with criminal cases will have heard the term "proof beyond a reasonable doubt." That burden does not apply in a civil case and you should, therefore, put it out of your mind in considering whether the parties have met their burdens of proof in this case.

In determining whether any fact has been proved by a preponderance of the evidence or by clear and convincing evidence, you may, unless otherwise instructed, consider the stipulations, the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.[10]

4. The Patent Claims

Before you can decide many of the issues in this case, you will need to understand the role of the patent "claims."

The patent claims are the numbered sentences at the end of each patent. The claims are important because it is the words of the claims that define what a patent covers. The figures and text in the rest of the patent provide a description and/or examples of the invention and provide a context for the claims, but it is the claims that define the breadth of the patent's coverage. Each claim is effectively treated as if it were a separate patent, and each claim may cover more or less than another claim. Therefore, what a patent covers depends, in turn, on what each of its claims covers. You will first need to understand what the Asserted Claims cover in order to decide whether or not there is infringement.[11]

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[10] Adapted from *Adaptix* at 9.

Here, Realtime alleges that Riverbed has infringed claim 1 of the '513 Patent and claims 1 and 14 of the '530 Patent. You should not attempt to determine infringement of any other claims of any of the Patents-in-Suit.[12]

The law says that it is the Court's role to define the terms of the claims and it is your role to apply these definitions to the issues that you are asked to decide in this case. Therefore, as I explained to you at the start of the case, I have determined the meaning of certain claim terms at issue in this case, and I have provided to you the definitions of these terms in your juror notebook. You must accept the definitions of these words in the claims as being correct. It is your job to take these definitions and apply them to the issues that you are deciding, including infringement.[13]

The claim language I have not interpreted for you in your notebook is to be given its ordinary and accustomed meaning as understood by one of ordinary skill

[11] Adapted from *Adaptix* at 9-10.
[12] Adapted from *Adaptix* at 10.
[13] Adapted from *Adaptix* at 10.

in the art.

4.1 How a Patent Claim Defines What It Covers

I will now explain how a patent claim defines what it covers.

A claim sets forth, in words, a set of requirements. Each claim sets forth its requirements in a single sentence. If a device or system satisfies each of these requirements, then it is covered by the claim.

In patent law, the requirements of a claim are often referred to as "claim elements" or "claim limitations." When a thing (such as a product, process, or system) meets all of the requirements of a claim, the claim is said to "cover" that thing, and that thing is said to "fall" within the scope of that claim. In other words, a claim covers a product, process, or system where each of the claim elements or limitations is present in that product, process, or system. Conversely, if the product, process, or system meets only some, but not all, of the claim elements or limitations, then that product, process, or system is not covered by the claim.[14]

4.2 Independent and Dependent Claims

This case involves two types of patent claims: independent claims and dependent claims.

An "independent claim" sets forth all of the requirements that must be met in order to be covered by that claim. Thus, it is not necessary to look at any other claim to determine what an independent claim covers. In this case, claim 1 of the '530 Patent and claim 1 of the '513 Patent are independent claims. Claim 14 of the

[14] *Adaptix* at 11.

’530 Patent is a “dependent claim.”

A dependent claim does not itself recite all of the requirements of the claim but refers to another claim for some of its requirements. The dependent claim incorporates all of the requirements of the claim to which it refers. In this case, claim 14 of the ’530 Patent depends from claim 1. In this way the claim “depends” on another claim. The dependent claim then adds its own, additional requirements. To determine what a dependent claim covers, it is necessary to look at both the dependent claim and any other claims to which it refers. A product or method is covered by a dependent claim if it meets all of the requirements of both the dependent claim and the claim or claims to which the dependent claim refers.[15]

4.3 Open-Ended or “Comprising” Claims

The beginning portion, or preamble, to some of the claims uses the word “comprising.” “Comprising” and “comprises” mean “including but not limited to” or “containing but not limited to.” Thus, if you decide that an accused product includes all the requirements in that claim, the claim is infringed. This is true even if the accused product includes components in addition to those requirements.[16]

5. Infringement – Generally

Patent law gives the owner of a valid patent the right to exclude others from importing, making, using, offering to sell, or selling the patented invention. Any person or business entity that has engaged in any of those acts without the patent

[15] Adapted from *Adaptix* at 14.
[16] *See* AIPLA’s Model Patent Jury Instructions, 3.5 & cmt. (2016).

owner's permission infringes the patent.[17]

You can have more than one patent governing an area of technology, although it may relate to different aspects of that technology. The mere fact that Riverbed has patents related to part of the technology of the accused features is not a defense to the fact that someone else may have a patent relating to another part of those features.

[OBJECTION: Riverbed objects to the paragraph in green directly above because it is out of place and tends to confuse the jury, particularly in light of Riverbed's intended evidence. The subject of this instruction is what infringement means generally. To interject an instruction intended to negate a perceived "defensive" theory that Realtime assumes Riverbed will assert has no place in this instruction. To the extent Realtime has an objection to any of Riverbed's evidence, it should object to such evidence at trial and seek limiting instructions where (and if) appropriate.]

[RESPONSE: This instruction comes from Your Honor's prior jury instruction, and is a correct statement of the law. *See, e.g., Virnetx Inc. v. Apple Inc., Case No. 6:12-cv-00855-RWS, Dkt. No. 428 (E.D. Tex. Feb. 3, 2016).* Moreover, it is neither out of place or confusing to the jury. And the fact that there may be other patents relevant to this case is all the more reason to include this instruction. Further, as noted previously, Defense counsel made comments about Riverbed patents purportedly covering its SteelHead products during voir dire that create a further need for this instruction.]

I will now instruct you as to the rules you must follow when deciding whether Realtime has proven that Riverbed infringed the Asserted Claims.

5.1 Direct Infringement – Literal Infringement

If any person makes, uses, offers to sell, or sells in the United States or imports into the United States what is covered by the claims of a patent without the patent owner's permission, that person is said to literally infringe the patent. To

[17] *Adaptix* at 15.

determine literal infringement, you must compare the accused product or methods with the Asserted Claims, using my instructions as to the meaning of the Asserted Claims.

A patent claim is literally infringed only if an accused product, system, or method includes each and every element in that patent claim. If the accused product, system, or method does not contain one or more of the elements recited in a claim, then that product, system, or method does not literally infringe that claim. If you find that the accused product, system, or method includes each element of the claim, then that product, system, or method literally infringes the claim even if such product, system, or method contains additional elements that are not recited in the claims.

An accused system or product directly infringes a system or product claim if it is reasonably capable of satisfying the claim elements even though it may also be capable of non-infringing modes of operation.[18]

[**OBJECTION: Riverbed objects to this instruction as an improper statement of the law as it applies to this case. Rather, the cited rule applies only to "a claim that recites capability and not actual operation."** ***Finjan, Inc. v. Secure Computing Corp.*****, 626 F.3d 1197, 1204 (Fed. Cir. 2010);** ***Ball Aerosol & Specialty Container, Inc. v. Limited Brands, Inc.*****, 555 F.3d 984, 994 (Fed. Cir. 2009) ("BASC's reliance on cases that found infringement by accused products that were reasonably capable of operating in an infringing manner is misplaced, since that line of cases is relevant only to claim language that specifies that the claim is drawn to capability."). Here,**

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[18] *See, e.g., Adaptix* at 16; *Georgetown Rail Equipment Co. v. Holland LP*, Case 6:13-cv-00366-RWS-JDL, D.I. 271 (E.D. Tex. Apr. 14, 2015) ("An accused system or product directly infringes a system or product claim if it is reasonably capable of satisfying the claim elements even though it may also be capable of non-infringing modes of operation."); *Hilgraeve Corporation v. Symamtec Corporation*, 265 F.3d 1336 (Fed. Cir. 2001) ("an accused device may be found to infringe if it is reasonably capable of satisfying the claim limitations, even though it may also be capable of non-infringing modes of operation"); *Intel Corporation v. U.S. Int'l Trade Comm'n*, 946 F.2d 821, 832 (Fed. Cir. 1995) ("the accused device, to be infringing, need only be capable of operating in the [accused] mode").

claims 1 and 14 of the '530 Patent both claim specific actual operation rather than capacity. For instance, claim 1 requires a data accelerator "coupled to." ***See SIPCO, LLC v. Amazon.com, Inc.***, **No. 2:08-CV-359, 2012 WL 5195942, at *56 (E.D. Tex.) (finding "configured to" to have a plain and ordinary meaning "to require not merely being capable of" "but rather being actually configured."). And claim 1 of the '513 patent is a method claim that necessarily requires someone to actually practice all steps of the claim. Further, Realtime asserts indirect infringement claims that cannot prevail absent a showing that Riverbed's customers actually use the products or practice the methods in an infringing manner.** ***See, e.g., ACCO Brands, Inc. v. ABA Locks Mgrs. Co., Ltd.***, **501 F.3d 1307, 1313 (Fed. Cir. 2007) (The "broad legal statement [that a product claim may be infringed 'if it is reasonably capable of satisfying the claim limitations, even though it may also be capable of non-infringing modes of operation'] does not alter the requirement that ACCO must prove specific instances of direct infringement or that the accused device necessarily infringes the patents in suit, in order to sustain the jury verdict of induced infringement.");** ***Dynacore Holdings Corp. v. U.S. Philips Corp.***, **363 F.3d 1263, 1275 (Fed. Cir. 2004) (recognizing that the "mere sale of a product capable of substantial non-infringing uses does not constitute indirect infringement of a patent" and concluding that patent owner "must therefore either demonstrate that [the accused products] necessarily infringe . . . or point to a specific instance of direct infringement and restrict its suit to liability stemming from that specific instance."). While the jury is being so instructed in the indirect infringement portion of the charge, the jury must look back to the general instructions on direct infringement to determine whether the underlying customer has directly infringed so as to support a claim of indirect infringement against Riverbed. To include the instruction proposed by Realtime impermissibly suggests to the jury that acts of indirect infringement could be based on something less than specific acts of actual infringement. At best, the instruction confuses the jury. At worst, it is wrong and it would be legally improper to instruct the jury as proposed by Realtime.**

REALTIME'S RESPONSE: As quoted in the cases cited in the footnote in support of this instruction, this instruction reflects a clear and accurate statement of the law, particularly for system claims which are apparatus claims and infringing systems need not be actually operated in a "infringing mode" in order to infringe. Riverbed has made contrary suggestions during its trial presentation which conflict with well-established law and the jury should be instructed on the correct law in light of these allusions during Riverbed's trial presentation.

A person may literally infringe a patent even though in good faith the person believes that what it is doing is not an infringement of any patent and even if it did not know of the patent. Literal infringement does not require proof that the person copied a product or the patent.

You must consider each of the Asserted Claims individually. You must be certain to compare each accused product, method, or system with each claim that such product, method, or system is alleged to infringe. Each accused product, method, or system should be compared to the limitations recited in the asserted patent claims, not to any preferred or commercial embodiment of the claimed invention. For infringement, it is improper to compare the claims to a prior art reference.

The same element or method step of the accused product or method may satisfy more than one element of a claim.[19]

If you find that Realtime has proved by a preponderance of the evidence that each and every limitation of an Asserted Claim is present in the accused product or system or is performed by Riverbed in its use of the accused feature or system, then you must find that such product, method, or system infringes that claim.[20]

5.2 Direct Infringement – Doctrine of Equivalents

If you decide that the Accused Product does not literally infringe an Asserted Claim, you must then decide whether it is more probable than not that product infringes the Asserted Claim under what is called the "doctrine of equivalents." Under the doctrine of equivalents, a product can infringe an Asserted Claim if it includes parts that are equivalent to those elements of the claim that are not literally present in the product. If the product is missing an equivalent part to even one element of the Asserted Claim, the product cannot infringe that claim under the doctrine of equivalents. Thus, in making your decision under the doctrine of equivalents, you must look at each individual element of the Asserted Claim and decide whether the product has an equivalent part to the individual claim element(s) that are not literally present in the product.

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[19] AIPLA's Model Patent Jury Instructions (2015).
[20] This section adapted from *Adaptix* at 16-17.

An equivalent of an element is a component or action that is insubstantially different from the claimed element. To show that an element is insubstantially different, Realtime must show that it performs substantially the same function, in substantially the same way, to achieve substantially the same result as would be achieved by the element that is not literally present in the accused product or method.

In deciding whether any difference between a claim requirement and the product is not substantial, you may consider whether, at the time of the alleged infringement, persons of ordinary skill in the field would have known of the interchangeability of the part or step with the claimed requirement. The known interchangeability between the claim requirement and the part or step of the product is not necessary to find infringement under the doctrine of equivalents.[21]

5.3 Limitations on the Doctrine of Equivalents – Prior Art

The prior art may preclude a finding of infringement under the doctrine of

[21] AIPLA's Model Patent Jury Instructions, 3.6 (2016).

equivalents. I will explain what prior art is, but, generally speaking, prior art is things that were already known or done before the invention. In reaching your decisions in this case, you must use the definition of prior art that I provide to you.

To determine whether the prior art precludes a finding of infringement under the doctrine of equivalents for a particular product that is accused of infringing a particular claim, you must determine what products are in the prior art as well as what products would have been obvious from the prior art to a person having an ordinary level of skill in the field of the technology of the patent at the time of the invention.

If Riverbed establishes that a product that: (1) meets the same claim requirements as the product that is accused of infringing and (2) has the same allegedly equivalent alternative features as the product that is accused of infringing is in the prior art or would have been obvious from the prior art to a person having ordinary skill in the field of technology of the invention at the time of the invention, you must find that the claim has not been infringed.[22]

[OBJECTION: Realtime objects to this instruction, as Riverbed did not disclose an argument regarding this instruction, through its expert, invalidity contentions, evidence, election of prior art, or otherwise. Moreover, this instruction is confusing, particularly where it is put in context of infringement instructions.]

[RESPONSE: Riverbed responds that applying prior art to bar the doctrine of equivalents should come as no surprise to Realtime. The prior art referenced and the theories backing it mirror the invalidity claims. The instruction is not confusing. It is taken directly from the model instructions and addresses specific application of the prior art to a claim for doctrine of equivalents and is placed accordingly in these

[22] Federal Circuit Bar Association, Model Patent Jury Instructions, B.3, 3.1d (2016).

instructions.]

5.4 Indirect Infringement – Active Inducement of Infringement

Realtime alleges that Riverbed is also liable for indirect infringement by actively inducing others to directly infringe the Asserted Claims. As with direct infringement, you must determine whether there has been indirect infringement by active inducement on a claim-by-claim basis.

Although Realtime need not prove that Riverbed has directly infringed to prove indirect infringement, Realtime must prove that someone has directly infringed. If there is no direct infringement by anyone, Riverbed cannot have actively induced infringement of the patent.

To show active inducement of infringement, Realtime must prove by a preponderance of the evidence that Riverbed's customers, or end-users, have directly infringed the Asserted Claims, and that Riverbed has actively and knowingly aided and abetted that direct infringement. Riverbed is liable for active inducement of a claim only if:

1. Riverbed has taken action during the time the patent is in force which encourages acts by someone else;

2. the encouraged acts constitute direct infringement of that claim;

3. Riverbed (a) was aware of the patent, and knew that the encouraged acts constitute infringement of the patent; or else (b) is willfully blind to the infringement of the patent. Willful blindness requires that Riverbed subjectively believed there was a high probability that the encouraged acts constituted infringement of the patent and Riverbed took deliberate actions to avoid learning of the infringement;

4. Riverbed had the intent to encourage infringement by someone else; and

5. the encouraged acts are actually carried out by someone else.

In order to prove active inducement, Realtime must prove that each of the above requirements is met by a preponderance of the evidence, i.e., that it is more likely true than not that each of the above requirements has been met.

If you find that Riverbed was aware of the patent, but believed that any acts it encouraged did not infringe that patent, Riverbed cannot be liable for active inducement of infringement.

6. Invalidity – Generally

I'll now instruct you on the rules that you must follow in deciding whether or not Riverbed has proven by clear and convincing evidence that the following claims are invalid: claim 1 of the '513 Patent and claims 1 and 14 of the '530 Patent.[23]

Patent invalidity is a defense to patent infringement. For a patent to be valid, the invention claimed must be new, useful, and not obvious. A patent cannot take away from people their right to use what was known or what would have been obvious when the invention was made.

An issued patent is accorded a presumption of validity based on the presumption that the United States Patent and Trademark Office, called the PTO, acted correctly in issuing the patent. To prove that any claim of a patent is invalid, Riverbed must persuade you by clear and convincing evidence that the

[23] *Adaptix* at 19.

claim is invalid.

Like infringement, validity is determined on a claim-by-claim basis. If one claim of a patent is invalid, this does not mean any other claim is necessarily invalid. Claims are construed the same way for determining infringement.

In making your determination as to validity, you should consider each claim separately. Finally, the manner in which the inventor developed his invention cannot be used to invalidate the patents-in-suit.

6.1 Prior Art

Under the patent laws, a person is granted a patent only if the invention claimed in the patent is new and not obvious in light of what came before. That which came before is referred to as the "prior art."

Prior art may include items that were publicly known or that have been used or offered for sale, or references, such as publications or patents, that disclose the claimed invention or elements of the claimed invention.[24] To be prior art, the item or reference must have been made, known, used, published, or patented either before the date of the invention, or more than one year before the filing date of the patent application. Prior art also includes a patent granted on an application for a patent by another filed in the United States and the application was filed before the patented invention was made.

In this case, Riverbed contends that the following items are prior art:

- U.S. Patent No. 7,190,284, referred to as "Dye;"

[24] *Adaptix* at 20.

- U.S. Patent No. 5,870,036, referred to as "Franaszek;"
- PCT Patent App. Pub. No. WO 00/46688, referred to as "Wang;"
- U.S. Patent No. 5,838,812, referred to as "Matsubara;"
- U.S. Patent No. 5,990,810, referred to as "Williams;"
- U.S. Patent No. 5,247,646, referred to as "Osterlund;" and
- the article "Automatic Synthesis of Compression Techniques for Heterogeneous Files" by William H. Hsu and Amy E. Zwarico, referred to as "Hsu."[25]

6.2 Invalidity – Anticipation

Riverbed contends that claims 1 of the '513 patent are invalid because they are anticipated by prior art. Riverbed bears the burden of establishing anticipation by clear and convincing evidence.

For someone to be entitled to a patent, the invention must actually be "new." Anticipation must be determined on a claim-by-claim basis.

For a claim to be invalid because it is anticipated, Riverbed must show that all of the requirements of that claim were described in a single prior-art reference. To anticipate the invention, the prior-art reference does not have to use the same words as the claim, but all of the requirements of the claim must have been disclosed, stated expressly to a person having ordinary skill in the field of the technology of the invention, so that looking at that one reference, that person could make and use the claimed invention.[26]

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[25] *See* AIPLA's Model Patent Jury Instructions, 5.0 (2016).
[26] *Adaptix* at 21; adapted from Federal Circuit Bar Association, Model Patent Jury Instructions, B.4.3, 4.3a-1 & 4.3b-1 (2016); *see also* AIPLA's Model Patent Jury Instructions, 4.3a1 (2016).

6.3 Invalidity – Obviousness

Riverbed contends that the following claims are invalid as obvious: claim 1 of the '513 patent and claims 1 and 14 of the '530 patent. Even though an invention may not have been identically disclosed or described before it was made by an inventor, in order to be patentable, the invention must also not have been obvious to a person of ordinary skill in the relevant field of technology of the patent at the time the invention was made.

A patent claim is invalid if clear and convincing evidence shows that the claimed invention would have been obvious to persons having ordinary skill in the field of the invention at the time the invention was made.

In determining whether a claimed invention is obvious, you must consider the level of ordinary skill in the field of technology of the patent that someone would have had at the time the claimed invention was made, the scope and content of the prior art, and any differences between the prior art and the claimed invention.

Keep in mind that the existence of each and every element of the claimed invention in the prior art does not necessarily prove obviousness. Most, if not all, inventions rely on building blocks of prior art. In considering whether a claimed invention is obvious, you may but are not required to find obviousness if you find that, as of the priority date of the Patents-in-Suit, there was a reason that would have prompted a person of ordinary skill in the field of the invention to combine the known elements in a way the claimed invention does, taking into account such factors as:

(1) whether the claimed invention was merely the predictable result of using prior art elements according to their known function(s);

(2) whether the claimed invention provides an obvious solution to a known problem in the relevant field;

(3) whether the prior art teaches or suggests the desirability of combining elements claimed in the invention;

(4) whether the prior art teaches away from combining elements in the claimed invention;

(5) whether it would have been obvious to try the combinations of elements, such as when there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions;

and

(6) whether the change resulted more from design incentives or other market forces.

To find that prior art rendered the invention obvious, you must find that the prior art provided a reasonable expectation of success. Obvious to try is not sufficient.[27]

In determining whether the claimed invention was obvious, consider each claim separately. Do not use hindsight, i.e., consider only what was known at the time of the invention.

In making these assessments, you should take into account any objective evidence (sometimes called "secondary considerations") that may shed light on the obviousness or not of the claimed invention, such as:

(1) Whether the invention was commercially successful as a result of the merits of the claimed invention (rather than the result of design needs or market-pressure advertising or similar activities);

[27] Federal Circuit Bar Association Model Patent Jury Instructions, B.4.3, 4.3c (2016).

(2) Whether the invention satisfied a long-felt need;

(3) Whether others had tried and failed to make the invention;

(4) Whether there were changes or related technologies or market needs contemporaneous with the invention;

(5) Whether others had skepticism about the invention or its likelihood of working;

(6) Whether the invention achieved unexpected results;

(7) Whether others in the field praised the invention;

(8) Whether persons having ordinary skill in the field of the invention expressed surprise or disbelief regarding the invention;

(9) Whether others sought or obtained rights to the patent from the patent holder; and

(10) Whether the inventor proceeded contrary to accepted wisdom in the field.

Although you should consider any evidence of these factors, the relevance and importance of any of them to your decision on whether the claimed invention would have been obvious is up to you.[28]

6.4 Level of Ordinary Skill

A person of ordinary skill at the respective times of the alleged inventions of the ’530, and ’513 Patents would have had at least an undergraduate degree in electrical engineering, computer science, or a related field, and two years of experience in information processing, including compression and storage. Alternatively, a person of ordinary skill with less than the amount of educational

[28] Adapted from *Adaptix* at 22-23; *see also* Federal Circuit Bar Association Model Patent Jury Instructions, B.4.3, 4.3c (2016).

training noted above could have had a correspondingly greater amount of experience in the relevant technologies.

7. Damages – Generally[29]

I will now instruct you on damages. If you find that Riverbed has infringed any valid Asserted Claims, you must determine the amount of money damages to which Realtime is entitled for that infringement.

The amount of damages must be adequate to compensate Realtime for the infringement. At the same time, your damages determination must not include additional sums to punish Riverbed or to set an example. You may award compensatory damages only for the loss that Realtime proves was more likely than not caused by Riverbed's infringement.

Realtime seeks damages in the form of a reasonable royalty. Generally, a reasonable royalty is the reasonable amount that someone wanting to use the patented invention should expect to pay to the patent owner and the patent owner should expect to receive.[30]

7.1 Damages – Burden of Proof

Where the parties dispute a matter concerning damages, it is Realtime's burden to prove the amount of damages by a preponderance of the evidence. Realtime must prove the amount of damages with reasonable certainty, but need not

[29] By deleting its proposed instructions on equitable estoppel in this jury instructions, Riverbed acknowledges the Court's statement at the pretrial conference not to allow the jury to consider Riverbed's equitable estoppel theory, but rather to address this equitable issue before the Court. Riverbed, therefore, reserves the right to assert its equitable estoppel theory before the Court.

[30] Adapted from *Adaptix* at 27.

prove the amount of damages with mathematical precision. However, Realtime is not entitled to damages that are remote or speculative. In other words, you should award only those damages that Realtime establishes that it more likely than not suffered.[31]

7.2 Damages – Date Damages Begin

In determining the amount of damages, you must determine when the damages began.

[Realtime's Proposed Instruction:]

For the '530 Patent, damages related to direct infringement begin on May 8, 2009, which is six years before filing of this lawsuit.

For the '513 Patent, damages related to direct infringement begin on the date the patent issued, which is February 4, 2014.

For the '513 and '530 Patents, if Riverbed shows that an "unmarked patented product" exists, then damages related to any direct infringement would not begin to accrue until the date that Realtime first notified Riverbed of its claims for patent infringement. This notice can be given in two ways, explained in detail below.

An "unmarked patented product" is a product not marked with the numbers for the '513 or '530 Patents but that practices every element of the Asserted Claims of the '513 and '530 Patents and that was sold by Realtime's licensee. The parties do not agree on whether an unmarked patented product exists, and it is up to you to determine whether one exists. Riverbed must show that there is an unmarked

[31] Adapted from *Adaptix* at 28.

patented product that practices every element of an Asserted Claim and that was sold by Realtime's licensee. If you find that one or more unmarked patented products exist, then it is up to you to determine the date that Realtime first notified Riverbed of its claims for patent infringement.

Riverbed bears the threshold burden of showing that an unmarked patented product exists. If Riverbed met its burden, then Realtime must prove that it is more likely than not that Riverbed actually was notified of Realtime's claim for patent infringement as of the date alleged by Realtime.

Realtime can give notice in two ways. The first way is to give notice to the public in general. Realtime can do this by showing that the licensees who sold or used the patented invention marked substantially all of their products that include the patented invention with the number of the patent. This type of notice starts from the date Realtime and its licensees began to mark substantially all of its products that use the patented invention with the patent number. If Realtime and its licensees did not mark substantially all of those products with the patent number, then Realtime did not provide notice this way.

A second way Realtime can give notice of its patents is to directly notify Riverbed with a specific claim that the Accused Products infringed the patents. This type of notice starts from the date Riverbed received the notice. If you find that Realtime, before filing this lawsuit, did not properly mark its products and did not notify Riverbed with a specific charge that the Accused Products infringed, the Realtime can only recover damages for infringement that occurred after it sued

Riverbed on May 8, 2015.[32]

[Riverbed's Proposed Instruction:]

For the '513 and '530 Patents, damages related to any direct infringement begin on the date that Realtime proves that it first notified Riverbed of its claims for patent infringement. The parties do not agree on that date, and it is up to you to determine what that date is. Realtime must prove that it is more likely than not that Riverbed actually was notified of the claim for patent infringement as of the date alleged by Realtime.

Keep in mind that any damages you award for indirect infringement by Riverbed through active inducement of its customers to commit infringement cannot begin until you find that Riverbed had actual knowledge of and intent to cause its customer's direct infringement, if any. Further, because the amount of damages for induced infringement is limited by the number of instances of direct infringement, Realtime must further prove the number of direct acts of infringement of the Patents-in-Suit, for example, by showing specific individual acts of direct infringement or by showing that a particular class of products directly infringes.[33]

[OBJECTION: Riverbed's instructions regarding marking are incomplete and inaccurate. The language added by Realtime clarifies the legal standard as set forth by the Court's order at Dkt. No. 571 at 3 ("The Court agrees with Judge Payne's opinion in *Blitzsafe* and Judge Love's opinion in this matter that the defendant bears the burden of showing that an unmarked patented product exists for purposes of the marking statute.").]

[RESPONSE: Riverbed responds that its proposed instruction

[32] Derived from AIPLA Model Patent Jury Instructions 11.1.2 (2016).
[33] Model Patent Jury Instructions for the Northern District of California, 5.10 (July 15, 2015).

accords with Federal Circuit precedent. *Dynacore Holdings Corp. v. U.S. Philips Corp.*, 363 F.3d 1263, 1275-76 (Fed. Cir. 2004); *Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*, 576 F.3d 1348, 1359 (Fed. Cir. 2009). In fact, Realtime's case further supports Riverbed's proposal. Riverbed contends that the record will show that because the Accused Products include multiple modes of operation—including non-infringing modes—they do not "necessarily infringe." *See* Dkt. 437 (Riverbed's Mot. Partial Summ. J. on Direct and Indirect Infringement) at 7-12. Accordingly, because customers can use the Accused Products in a non-infringing way, Realtime must prove acts of direct infringement to be entitled to any damages for indirect infringement.]

7.3 Damages – Reasonable Royalty

A reasonable royalty is the amount of money a willing patent owner and a willing prospective licensee would have agreed upon at the time the infringement began for a license to make, use, or sell the invention. It is the royalty that would have resulted from an arms-length negotiation between a willing licensor and a willing licensee. This is known as the hypothetical negotiation. Unlike in a real world negotiation, all parties to the hypothetical negotiation are presumed to believe that the patent is infringed and valid.

In considering this hypothetical negotiation, you should focus on what the expectations of the patent owner and the infringer would have been had they entered into an agreement at that time, and had they acted reasonably in their negotiations. The reasonable royalty you determine must be a royalty that would have resulted from the hypothetical negotiation, and not simply a royalty either party would have preferred. One way to determine a reasonable royalty is to multiply a reasonable royalty base by a reasonable royalty rate.

The parties agree that the date of the hypothetical negotiation between

Riverbed and Realtime for infringement of any of the Asserted Claims of the ’530 Patent would have been in August 2008. If you find that the Asserted Claims of the ’530 Patent are not infringed or are invalid, but one or more of the Asserted Claims of the ’513 Patent are infringed and valid, then the date of the hypothetical negotiation between Riverbed and Realtime would be February 2014.

In making your determination of the amount of a reasonable royalty, it is important that you focus on the time period when Riverbed first infringed that patent and the facts that existed at that time. However, evidence of things that happened after the infringement first began may be considered in evaluating the reasonable royalty only to the extent that the evidence aids in assessing what royalty would have resulted from a hypothetical negotiation. Your determination does not depend on the actual willingness of the parties to this lawsuit to engage in such negotiations. Your focus should be on what the parties’ expectations would have been had they entered negotiations for royalties at the relevant time.

When determining a reasonable royalty, you may consider evidence concerning the amounts that other parties have paid for rights to the patents in question, or for rights to similar technologies. A license agreement need not be perfectly comparable to a hypothetical license that would be negotiated between Realtime and Riverbed in order for you to consider it. However, if you choose to rely upon evidence from any license agreements, you must account for any differences between those licenses and the hypothetically negotiated license between Realtime and Riverbed when you make your reasonable royalty determination including, the type of technology licensed, whether the license contained a cross-license and/or similar patent protections, whether the license contained any value related to a release of liability, the date when the license was entered, the financial or economic conditions of the parties at the time the parties entered into the license, the extent of use (if any) of any particular licensed patents, the number of patents involved in the license, whether or not the license covered foreign intellectual property rights, the extent to which litigation may have affected the license, and whether, contrary to the hypothetical negotiation, the licensee in the real world license, at the time of entering the license, believed that the patents were either not infringed or were invalid.

[OBJECTION: Riverbed objects to the preceding paragraph as an unsupported and selective repetition of certain damages elements above others.]

[RESPONSE: This paragraph is accurate statement of the law and is directly from Your Honor's prior jury instruction in, *e.g.*, *Virnetx Inc. v. Apple Inc.*, Case No. 6:12-cv-00855-RWS, Dkt. No. 428 (E.D. Tex. Feb. 3, 2016). Moreover, there are 15 *Georgia-Pacific* factors. Deleting two of those 15 (factors 8 and 12) is confusing, inappropriate, and incomplete.]

The reasonable royalty award must be based on the [incremental] value [that the patented invention adds to the end product] [of the infringing features of the accused products]. When the infringing products have both patented and unpatented features, measuring this value requires a determination of the value added by the patented features. It is not the case that the value of all conventional elements must be subtracted from the value of the patented invention as whole when assessing damages. The ultimate combination of royalty base and royalty rate must reflect the value attributable to the infringing features of the product, and no more.[34]

[OBJECTION: Realtime objects to the Riverbed's language:

- **"at the relevant time as determined by your findings on infringement and invalidity": This language is an incorrect statement of the law. Damages analysis must assume infringement and validity. Riverbed's insertion can only confuse the jury about the correct law and prejudice Realtime.**

- **Realtime objects to the last paragraph inserted by Riverbed as extraneous cherry-picked instruction that is incomplete statement of the law. "What is taken from the owner of a utility patent (for purposes of assessing damages under § 284) is only the patented technology, so the value to be measured is only the value of the infringing features of an accused product." *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1226 (Fed. Cir. 2014). The determination of the value of what is taken can be done by selection of royalty base, royalty rate, or a combination of both. *Id.* Moreover, "[i]t is not the case that the value of all conventional elements must be subtracted from the value of the patented invention as a whole when assessing damages." *Astrazeneca AB v. Apotex Corp.*, 782 F.3d 1324, 1339 (Fed. Cir. 2015). Furthermore, Your Honor's instruction already has sufficient and correct statement on apportionment.]**

[RESPONSE:

Regarding the second bullet point above, Riverbed responds that the final paragraph is an accurate statement of law and is taken verbatim from the AIPLA's Model Patent Jury Instructions, 11.13, which is taken from *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1226 (Fed. Cir. 2014). This instruction is important to protect against the jury providing a damage award beyond the value of the patented invention to the accused product or method.]

7.4 Royalty Base

In patent cases involving a reasonable royalty, you, the jury, are asked to

[34] This final paragraph is taken verbatim from AIPLA's Model Patent Jury Instructions, 11.13 (last paragraph). (2016).

choose a royalty base as the starting point for calculating the reasonable royalty award.

In this case, Realtime contends that Riverbed's sales of the Accused Products lead to sales of related services that should be considered in determining the royalty base. The law recognizes that the concept of "convoyed sales" (also known as "collateral sales") may be relevant to your determination of the royalty base. A "convoyed sale" refers to the relationship between the sale of a patented product and a functionally associated non-patented product. Convoyed sales do not include items that have essentially no relationship to the patented invention and that may have been sold with an infringing device only as a matter of convenience or business necessity.

You may rely on evidence that the Accused Products are bundled with sales of Riverbed's other products to determine the royalty base. The evidence of convoyed sales may be relevant to your determination of the royalty rate, the royalty base, or both.[35]

[OBJECTION:[36] Realtime's damages expert has never properly identified a convoyed product to support a convoyed-sales analysis. Rather, Realtime's damages expert references services Riverbed may offer its customers, which cannot "constitute a single functional unit." However, should the Court allow a separate instruction concerning including convoyed sales in

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[35] *Ericsson, Inc. v. D-Link Systems, Inc.*, 773 F.3d 1201, 1226 (Fed. Cir. 2014); *Interactive Pictures Corp. v. Infinite Pictures, Inc.,* 274 F.3d 1371, 1385 (Fed. Cir. 2001); *Fujifilm Corp. v. Benum*, 605 F.3d 1366, 1373 (Fed. Cir. 2010).

[36] Riverbed, while recognizing the Court's recent ruling on convoyed sales, maintains its objection to Realtime including convoyed or collateral sales in its proposed royalty base. Convoyed sales, if they apply at all, should be considered in connection with the jury's analysis of the *Georgia-Pacific* factors in reaching an appropriate royalty rate. If the Court deems it appropriate to instruct the jury that convoyed sales are relevant, the appropriate place for such an instruction is in connection with *Georgia-Pacific* factor 6 below. Including several paragraphs of instruction favoring one *Georgia-Pacific* factor over all others is highly prejudicial and improper.

the royalty base, Riverbed proposes the following instruction:]

In this case, Realtime contends that Riverbed's sales of the Accused Products leads to sales of related services that should be considered in determining the royalty base. These other services are called "collateral products." For you to consider collateral products in arriving at a royalty base, Realtime must prove two things: First, Realtime must prove that it is more likely than not that Riverbed would not have sold the collateral products but for the infringement of the accused products. Second, a collateral product and the competitive product together must be analogous to components of a single assembly or parts of a complete machine, or, in other words, they must constitute a single functional unit. Collateral products may not be considered in arriving at a royalty base for infringement of a method or process; they may only be considered in arriving at a royalty base for sale of a product.

Consideration of collateral products in arriving at a royalty base must not include items that essentially have no functional relationship to the accused product and that have been sold with the accused product only as a matter of convenience or business advantage.[37]

[**OBJECTION AND RESPONSE:**

Riverbed's proposed instruction misstates the law supporting this Court's order that "convoyed sales may be included in the royalty base." Dkt. No. 567 ("as long as an expert has performed sufficient analysis, convoyed sales may be used to form the royalty base.") The Federal Circuit has never held that convoyed sales are limited to "collateral products" or are defined as "products" as opposed to services sold as a result of sales of an infringing product. *Id.* Riverbed's instruction is designed to limit the

[37] Federal Circuit Bar Association, Model Patent Jury Instructions, B.6, 6.3 (2016).

scope of convoyed sales to *products* as opposed to *services.* Yet this Court has repeatedly held that the facts in this case would support a finding that Riverbed's sales of technical support services to substantially all its customers of the Accused Products is relevant to the determination of the royalty base. Courts permit evidence of convoyed sales related to services as well as products. *Oracle America, Inc. v. Google, Inc.,* 847 F. Supp. 2d 1178, 1184 (N.D. Cal. Jan. 9, 2012). Further, the proposed instruction from the Federal Circuit Bar Association – which includes a "but for" test and a "single functional unit" test -- solely relies on the body of law relating to lost profits and/or "entire market value rule" cases, and it does not at all acknowledge controlling Federal Circuit authority in *Fujifilm Corp. v. Benun,* 605 F.3d 1366, 1373 (Fed. Cir. 2010), *American Seating Co. v. USSC Group, Inc.,* 514 F.3d 1262, 1268 (Fed. Cir. 2008), and *Interactive Pictures Corp. v. Infinite Pictures, Inc.,* 274 F.3d 1371, 1385 (Fed. Cir. 2001*)* that analyze convoyed sales in the reasonable royalty context. The Federal Circuit in *Fujifilm, American Seating,* and *Interactive Pictures* makes clear that the stringent lost profits test proposed by Riverbed is not applicable in the reasonable royalty context. These cases do not recite a "but for" test, and they permitted evidence of convoyed sales to go to the jury even though the plaintiff could not meet a "single functional unit" test designed to address different factual circumstances. For example, the court in *Fujifilm* allowed non-infringing lens-fitted film packages to be included in the royalty base with infringing lens-fitted film packages without requiring the patent holder to meet the two-part test described in Riverbed's instruction; this is evidence from the fact that the non-infringing film packages allowed in the royalty base did not constitute "parts of a complete machine" with the infringing film packages. Furthermore, Riverbed's instruction recites language regarding a 'single functional unit' that is not applicable here. In *Fujifilm* and *Interactive Pictures,* the Federal Circuit never described a requirement that convoyed sales must be part of a "single functional unit."]]

7.5 Reasonable Royalty Factors

In deciding what is a reasonable royalty that would have resulted from the hypothetical negotiation, you may consider the factors that the patent owner and the alleged infringer would consider in setting the amount the alleged infringer should pay.

I will list for you a number of factors you may consider. This is not every possible factor, but it will give you an idea of the kinds of things to consider in setting a reasonable royalty.

(1) The royalties received by the patentee for licensing of the patents-in-suit, proving or tending to prove an established royalty.

(2) Royalties paid for other patents comparable to the patents-in-suit.

(3) The nature and scope of the license, as exclusive or nonexclusive; or as restricted or nonrestricted in terms of territory, or with respect to the parties to whom the product may be sold.

(4) Whether or not the licensor had an established policy and marketing program to maintain its patent exclusivity by not licensing others to use the invention or by granting licenses under special conditions designed to preserve that exclusivity.

(5) The commercial relationship between the licensor and licensee, such as whether they are competitors in the same territory and the same line of business, or whether they are inventor and promoter.

(6) Whether being able to use the patented invention helps in making sales of other products or services, such as convoyed sales.

(7) The duration of the patent and the term of the license.

(8) The established profitability of the product made under the patents, its commercial success, and its current popularity.

(9) The utility and advantages of the patented invention over the old modes or devices, if any, that had been used for achieving similar results.

(10) The nature of the patented invention, the character of the commercial embodiment of it as owned and produced by the licensor, and the benefits to those who have used the invention.

(11) The extent of the licensee's use of the patented invention and any evidence probative of that use.

(12) The portion of the profit or of the selling price that may be customary in the particular business or in comparable business to allow for the use of the invention or analogous inventions.

> (13) The portion of the profits that is due to the patented invention, as compared to the portion of the profit due to other factors, such as unpatented elements or unpatented manufacturing processes, or features or improvements developed by the licensee.
>
> (14) Expert opinions as to what would be a reasonable royalty.
>
> (15) The amount that a licensor and a licensee would have agreed upon if both sides had been reasonably and voluntarily trying to reach an agreement; that is, the amount which an accused infringer would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable to a patent owner if it would have been willing to create a license.

No one factor is dispositive and you can and should consider the evidence that has been presented to you in this case on each of these factors..[38]

Realtime has relied on license agreements in which royalties were based on a percentage of the entire price of the smallest saleable patent practicing licensed end-products, but in determining a reasonable royalty, you must not rely on the overall price of Riverbed's accused products at issue in this case. Damages for patent infringement must be apportioned to reflect the value the invention contributes to the accused products or features and must not include value from the accused products or features that is not attributable to the patent.

7.6 Reasonable Royalty – Method Claims

In order to recover damages for infringement of a method claim, Realtime must either prove that the Accused Product necessarily infringes the Patents-in-Suit or prove acts of direct infringement by Riverbed. Because the amount of damages for induced infringement is limited by the number of instances of direct infringement, Realtime must further prove the number of direct acts of

[38] Adapted from Federal Circuit Model Patent Jury Instructions, 6.7 & cmt. (adopting *Georgia-Pacific* factors).

infringement of the Patents-in-Suit, for example, by showing individual acts of direct infringement or by showing that a particular class of products directly infringes.[39]

[OBJECTION: Realtime objects to this instruction as confusing and unnecessary, and duplicative of other instructions on infringement and damages.]

8. Instructions for Deliberations

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be controlled by sympathy, prejudice, or public opinion. All parties expect that you will carefully and impartially consider all the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

You should consider and decide this case as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons, including corporations, and other organizations stand equal before the law, regardless of size or who owns them, and are to be treated as equals.

When you retire to the jury room to deliberate on your verdict, you may take this charge with you as well as exhibits, which the Court has admitted into evidence. Select your Foreperson and conduct your deliberations. If you recess during your deliberations, follow all of the instructions that the Court has given you

[39] AIPLA's Model Patent Jury Instructions, 11.19 (2016); *Cardiac Pacemakers, Inc. v. St. Jude Medical, Inc.*, 576 F.3d 1348 (Fed. Cir. 2009).

about your conduct during trial. After you have reached your verdict, your Foreperson is to fill in on the form your answers to the questions. Do not reveal your answers until such time as you are discharged, unless otherwise directed by me.

Any notes that you have taken during this trial are only aids to memory. If your memory should differ from your notes, then you should rely on your memory and not on the notes. Your notes are not evidence. A juror who has not taken notes should rely on his or her independent recollection of the evidence and should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.

If you want to communicate with me at any time, please give a written message or question to the Court Security Officer, who will bring it to me. I will then respond as promptly as possible either in writing or by having you brought into the courtroom so that I can address you orally. I will always first disclose to the attorneys your question and my response before I answer your question.

After you have reached a verdict, you are not required to talk with anyone about the case unless the Court orders otherwise.